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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON, *Petitioner,*

against

MOORE-McCORMACK LINES, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

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This reply brief is submitted lest respondent's brief in opposition prove misleading upon the questions presented and the reasons for allowance of the writ.

Contrast of the Petition and Respondent's Brief

Respondent's brief in opposition states (p. 2) that "The sole question raised" is "whether the petitioner's exclusive remedy" is under the Compensation Law; or (p. 6) whether "the New York law has been properly applied to all of the facts".

Aside from those questions, respondent thus makes no reference to the questions presented under Rules 52 and 76, Fed. Rules Civ. Proc., nor to those expressly presented under the Thirteenth and Fourteenth Amendments of the

national Constitution. Rather, the brief for respondent in opposition states (p. 11) that "No constitutional questions are involved under the stipulated facts".

By contrast, however, the petition (pp. 11-15) states eight "Questions Presented". Those numbered 1 to 4 under "A" (pp. 11-12) cover both misconstruction, by the U. S. Court of Appeals, of the New York Workmen's Compensation Law to comprehend assault and battery committed as a method of trying to force petitioner into involuntary servitude of respondent, and violation thereby of the Thirteenth and Fourteenth Amendments.

Those numbered 5 to 8 under "B" (pp. 13-15) cover violation by the U. S. Court of Appeals of Rules 52 and 76, Fed. Rules Civ. Proc., the stipulated facts, the District Court's findings, and the Thirteenth and Fourteenth Amendments, in reversing the District Court judgment without properly considering the inferences from the agreed statement and the determination of the constitutional questions inherent in the District Court's judgment nor considering or determining whether these were or were not "clearly erroneous".

The petition (pp. 15-32) contains twenty-six "Reasons for Allowance of the Writ" covering violation by the U. S. Court of Appeals decision of the Thirteenth and Fourteenth Amendments and related statutes, the New York Workmen's Compensation Laws, and Rules 52 and 76, Fed. Rules Civ. Proc., and its conflict upon vital points with decisions of this Court, decisions of other Federal courts, decisions of the New York courts and decisions of courts of other States having similar workmen's compensation statutes.

POINT I

Either the State statute has been misinterpreted or it and the Court of Appeals reversal violate the Thirteenth and Fourteenth Amendments. This squarely presents the constitutional questions; the decision below reversing without their determination violates those constitutional provisions and due process, as well as Rules 52 and 76, and review here is "imperative".

This Court has frequently held that "In every case, therefore, where legislative abridgment" of "fundamental rights and liberties" is claimed "*the courts should be astute to examine the effect* of the challenged legislation" (*Schneider* v. *Irvington*, 308 U. S. 147, 161); that "where the issue is whether a State statute *in its application to facts which are set out in detail* • • • violates the Federal Constitution, this Court must analyze the facts • • • and draw its own inferences as to their *ultimate effect*" (*Truax* v. *Corrigan*, 257 U. S. 312, 325); and that "*It is imperative* that, when the effective exercise of these rights is claimed, the courts should 'weigh the circumstances'" (*Thornhill* v. *Alabama*, 310 U. S. 88, 96). (Italics ours.)

Moreover, "it is of prime importance that no constitutional freedom • • • be defeated by insubstantial findings of fact *screening reality*"; there is "the duty of this Court to enforce constitutional liberties even when denied through *spurious* findings of fact" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293, 299). (Italics ours.)

In *Kelley* v. *Rhoads*, 188 U. S. 1, reversing 9 Wyo. 352, there was an agreed statement of facts, as here, upon which turned applicability of a state statute or a provision of the national Constitution, and this Court held that "The question turns upon the purpose for which the sheep were driven into the State" (188 U. S. 7). This Court held that "This question must be answered by the agreed statement

of facts", but that "different inferences may be drawn from those facts as to the applicability of the state statute" (188 U. S. 5), and held the State statute inapplicable because the agreed statement showed an interstate driving through for the purpose of shipment, sufficient to make the commerce provisions of the Constitution applicable.

Here, employment was by daily "shape up"—each day's employment being a separate contract. Plaintiff having checked out and started home, neither defendant nor plaintiff would be parties to a renewed employment without new hiring. Cooke "demanded" that petitioner "*return* to work", that he "*Get back and punch the clock*" to renew employment, and "Cooke struck the plaintiff because the latter *refused* to return to work" (R. 4).

Suppose the reverse demand had occurred; that plaintiff —being passed over in "shape up" or after conclusion of a day's employment and punching out—"demanded" that defendant reemploy him, and became violent on defendant's refusal and was injured or injured another. Would defendant be his "employer", with such violence and injury arising "out of" and "in the course of" his employment so as to entitle him to compensation? Yet, as respects liberty of contract "in the long-established constitutional sense", this Court holds: "The right is as essential to the laborer as to the capitalist" (*Coppage* v. *Kansas*, 236 U. S. 1, 14). Moreover, the Thirteenth Amendment specifically protects petitioner against "involuntary servitude"—and hence against being treated by the courts as an "employee" when he is assaulted for *refusing* to agree to be one.

Here, also, "In such a setting it could justifiably be concluded that the *momentum of fear* generated in past violence would survive" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294). Respondent's very defense here is inconsistent with any claim that Cooke's assaulting "activities were unauthorized" (*H. J. Heinz Co.* v. *National Labor Rel. Board*, 311 U. S. 514, 521). And, despite the stipulation showing the assault after petitioner *terminated* his employment, and "*because* the latter *re-*

fused to return to work" (R. 4)—which even the Court of Appeals said "was the method he [the dock boss] adopted to try to *force* [petitioner] to work more overtime than the latter was willing to perform" (R. 17)—respondent in the lower courts, and still in this Court, claims an "employee" status for petitioner, subject to workmen's compensation as his exclusive remedy. It thus claims employment of petitioner, *not by petitioner's voluntary contract,* but by Cooke's dominion, hiring authority, detention, coercion and assault of petitioner after the petitioner had terminated such relationship and refused to renew it. It thus also seeks to gain for the future "the momentum of fear generated" in petitioner's assault (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294).

Petitioner's claim of infringement of his constitutional rights under the national Constitution is itself ground for granting certiorari (*International Brotherhood* v. *Hanke,* 339 U. S. 470, 474). That these were earnestly pressed below both on original argument and on application for rehearing is clear from the petition for rehearing (R. 20, 23, 25-26).

Moreover, the requirement that District Court findings be accepted unless "clearly erroneous" has been applied even on appeal direct to this Court from the District Court (*U. S.* v. *Nat. Assn. R. E. B.,* 339 U. S. 485, 494-496).

A writ of certiorari should be granted.

Respectfully submitted,

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